APPENDIX A — OPINION OF THE SUPREME COURT OF INDIANA DATED OCTOBER 29, 2002

Supreme Court of Indiana

No. 49S00-0005-DI-341.

In the Matter of Michael A. **WILKINS.**

Oct. 29, 2002

DISCIPLINARY ACTION

PER CURIAM.

Attorney Michael A. Wilkins is an experienced appellate practitioner. In a brief supporting a petition for transfer to this Court, he stated that an opinion of the Indiana Court of Appeals left him wondering whether the Court of Appeals was determined to find for the adverse party, and whether it then said whatever was necessary to reach that conclusion. We find today that such statements violated Ind.Professional Conduct Rule 8.2(a) and warrant the respondent's suspension from the practice of law in this state.

This case is now before us upon the hearing officer's findings of fact and conclusions of law and the respondent's petition for our review of those findings and conclusions. Where a party petitions this Court for review, we review *de novo* the record presented us to reach the ultimate conclusion as to misconduct and sanction therefore. *Matter of Robak*, 654 N.E.2d 731 (Ind.1995). Additionally, the respondent has requested oral argument on the questions presented in his petition for review. We deny that request.

Appendix A

The respondent is an attorney in good standing, having been duly admitted to practice law in this state on October 14, 1988. He is a member of the litigation section in the Indianapolis law firm of Ice Miller and concentrates his practice in family and adoption law, appeals, general litigation, and media law. During 1997, 1998, and 1999, the respondent represented and served as local counsel for Michigan Mutual Insurance in an appeal of an adverse verdict from the Vigo Superior Court. On August 27, 1998, the Court of Appeals issued its opinion in *Michigan Mutual Insurance Company v. Sports, Inc.*, 698 N.E.2d 834 (Ind.Ct.App.1998). The court's opinion affirmed the trial court's verdict and award. Thereafter, primary counsel for Michigan Mutual prepared a draft brief to accompany a "Petition to Transfer" to this Court and forwarded the draft to the respondent. The respondent then edited the draft and "toned down" the tenor of the brief.

The respondent believed that *Michigan Mutual Insurance Co. v. Sports, Inc.* misstated material facts and ignored or misapplied controlling precedent, such that transfer to this Court may have been appropriate under Ind. Appellate Rule 11(B)(2)(c) and (f).[1]

Footnote 15 of the Court of Appeals opinion states:

> Specifically, Michigan Mutual claims the Hopper Agency had "limited authority to bind [it] to coverage and accept premiums on its behalf," but not the authority to "alter policy provisions, appoint subagents, or do anything else that general

1. That rule was the precursor to the current App.R. 57.

> agents typically can do." Michigan Mutual's Brief at 23. It cites neither authority nor evidence in the record to support the latter proposition.

On September 25, 1998, the respondent signed and filed Michigan Mutual's "Petition to Transfer" and "Brief in Support of Appellant's Petition to Transfer" with the Clerk of this Court. Even though the respondent did not necessarily author the words at issue here (a task admittedly performed by Michigan counsel), the respondent signed the brief pursuant to Ind.Admission and Discipline Rule 3(2)(d), and was therefore "jointly responsible therefore."

The respondent, in the "Petition to Transfer" challenged the Court of Appeals' decision, in relevant part, pursuant to App.R. 11(B)(2)(f), by arguing:

> 4. The opinion of the Court of Appeals is in error for the following reasons:
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> > A. The opinion erroneously and materially misstates the record by making affirmative misstatements regarding the evidence, which directly affected the court's ultimate conclusion (specific misstatements, and their prejudicial effect on Michigan Mutual, are discussed in the accompanying Brief in Support); [. . .]

The respondent, in the "Brief in Support of Appellant's Petition to Transfer," amplified his client's position, *inter alia* with the following statements:

Appendix A

> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.[2]
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> . . .

On March 5, 1999, this Court denied the "Petition to Transfer" and ordered the supporting brief stricken as a "scurrilous and intemperate attack on the integrity of the Court of Appeals. . . ." *Michigan Mutual Insurance Company v. Sports, Inc.*, 706 N.E.2d 555 (Ind.1999).

At disciplinary hearing, the respondent contended that an agency agreement which had been cited to the Court of Appeals in the record, as well as the testimony of two trial witnesses, supported his contention that the Court of Appeals misstated the record and facts in that there was evidence in the record to establish a limited agency as opposed to a general

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2. Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

agency. The respondent also cited case law to the Court of Appeals, which he contended the Court of Appeals ignored.

After this Court issued its decision denying transfer, the respondent contacted the office of the John T. Sharpnack, Chief Judge of the Indiana Court of Appeals, and Randall T. Shepard, Chief Justice of the Supreme Court of Indiana, to schedule meetings with them to offer his personal apology. However, before being able to personally speak with Judge Sharpnack or Chief Justice Shepard, the respondent received the "Request for Investigation" which initiated these disciplinary proceedings, after which he wrote to both Judge Sharpnack and Chief Justice Shepard, offering to apologize in person and to acknowledge that the footnote was "overly-aggressive and inappropriate and should never have made its way into our Brief."

The Commission charged the respondent with violating Prof. Cond. R. 8.2(a) by making statements that he knew to be false, or with reckless disregard as to their truth or falsity concerning the integrity or qualifications of a judge, or, in this case, a three-judge panel of the Indiana Court of Appeals.[3]

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3. Rule Indiana Professional Conduct Rule 8.2(a) states, in relevant part:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Appendix A

The hearing officer found that the respondent violated Prof.Cond.R. 8.2(a) by the statements he made in footnote 2, but did not find a violation as to the other quoted sections, concluding that the statements merely paraphrased provisions of App.R. 11(B), governing grounds for transfer to this Court. We turn back to the language used by the respondent in his petition for transfer and supporting brief:

> The opinion erroneously and materially misstates the record by making affirmative misstatements regarding the evidence . . .
>
> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point.

We note that relevant portions of former App.R. 11(B)(2) provided:

> Errors upon which a petition to transfer shall be based may include:
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> > (f) that the opinion or memorandum decision of the Court of Appeals erroneously and materially misstates the record, concisely setting out the misstatement (with reference to the record where appropriate), the materiality of the misstatement and specifically stating the resulting prejudice to the petitioner.

Appendix A

We find that the respondent's statements quoted above, although heavy-handed, roughly paraphrase the bases of transfer as set forth in former App.R. 11(b) such as to avoid violation of Prof.Cond.R. 8.2(a).

The respondent's comments in footnote 2, however, are not even colorably appropriate. In footnote 2 of the "Brief in Support of Appellant's Petition to Transfer," the respondent suggested that the judges on the Court of Appeals may have been motivated in their decision making by something other than the proper administration of justice, and, in fact, suggested unethical motivations. We find that his comments in footnote 2 violated Prof.Cond.R. 8.2(a) because they were made with reckless disregard as to the truth or falsity concerning the integrity of a three-judge panel of the Court of Appeals.

In his petition for review, the respondent argues that the application of Prof.Cond.R. 8.2 in this case would be an unconstitutional restriction of free speech. However, he provides no authority specifically illustrating why or how his statements are protected by state or federal constitutional provisions.

In *Matter of Friedland*, 275 Ind. 214, 416 N.E.2d 433 (1981), a respondent attorney was accused of attempting to influence public officials by threatening and publishing critical comments about the Commission. The respondent argued that his conduct was protected free speech. There, we stated:

Appendix A

> This Court in the past has not addressed, specifically, the constitutional tension between the First Amendment and the *Code of Professional Responsibility.* Upon reflection of this question, it is our belief that a generalized test cannot be drawn. Each prohibition, circumscribed by the factual setting present in a particular case, must be examined in light of the affected State interest and measured against the limitation placed on the freedom of expression.

Id. at 437. The prohibitions in Prof.Cond.R. 8.2(a) are concerned with preserving the public's confidence in the administration of justice. *See, e.g., Matter of Garringer*, 626 N.E.2d 809, 813 (Ind.1994) ("We note that the duty violated by the Respondent [in violating Prof.Cond.R. 8.2] was his obligation to refrain from acting in a way that damages the integrity of the judicial system. . . . As we have stated, '[u]nwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purpose and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process [other citation omitted].' "). *See also Comment* to Prof.Cond.R. 8.2.[4] Applying

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4. That Comment provides, in relevant part:

> Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

the *Friedland* analysis here, we find that the respondent offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for appellee, no matter what. Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission. *See Matter of Becker*, 620 N.E.2d 691 (Ind.1993) (noting that if a lawyer believes a judicial officer had engaged in misconduct, the appropriate course of action would be to bring a complaint to the Judicial Qualifications Commission). In this case, the state's interest in preserving the public's confidence in the judicial system and the overall administration of justice far outweighed any need for the respondent to air his unsubstantiated concerns in an improper forum for such statements.

We are also not persuaded by the respondent's contention (again unsupported by any cited authority) that his statements were merely a "critique of the Opinion in a format used throughout the bench, bar, and journals." Our current rules of appellate procedure dictate the boundaries of acceptable appellate practice. For example, App.R. 46(A)(8)(a) requires that arguments on appeal must be supported by cogent reasoning, citations to authorities, statutes or the record. A statement used in a document filed before the appellate courts that contains an assertion the lawyer knows to be false or made with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge is neither a "format" contemplated by our appellate rules nor allowed by our *Rules of Professional Conduct*.

Appendix A

Having found misconduct, we now address the issue of proper sanction. In this analysis, we examine the nature of the violation, specific acts of the attorney, the Court's responsibility to preserve the integrity of the Bar, and any risk to which the public will be subjected if the attorney is permitted to continue in the profession, any consequences that flow from the alleged conduct, the state of mind of the attorney, and any exacerbating or mitigating factors. *Matter of Charos*, 585 N.E.2d 1334 (Ind.1992). The hearing officer found that the respondent has maintained an outstanding and exemplary record for honesty, integrity, and truthfulness among his peers in the Bar, and among members of the judiciary. He also found that the respondent made a full and complete disclosure of the facts surrounding this disciplinary matter and has maintained a completely cooperative attitude toward the disciplinary process. Also cited was his extensive involvement in community and civic activities.

We also consider aggravating factors. Although the parties submitted a written stipulation regarding the respondent's remorse for his actions, the hearing officer found that the respondent's testimony "belied his belief that this disciplinary action stems merely from a poor choice of words." The respondent's stated remorse related only to his feelings of personal embarrassment and public humiliation as the result of this Court's order striking the offending brief. In essence, the respondent averred that, although he might use different language, he believes in the substance of the language contained in the footnote. That he chose to contest this matter through all procedures available under the Admission and Discipline Rules further underscores our conclusion that his remorse only attaches to the fact his

statements were not without consequence, notwithstanding his earlier attempts personally to apologize to members of the appellate bench.

Similar instances of violation of Prof.Cond.R. 8.2 have garnered short suspension. *See, e.g., Becker, supra*, (30 day suspension from the practice of law for accusations that a trial judge manipulated the record in order to rule against his client); *Matter of Reed*, 716 N.E.2d 426 (Ind.1999) (public reprimand for stating that the trial court judge's "arrogance is exceeded only by her ignorance," and that "she doesn't have any comprehension of what's going on with respect to those [Title IV-D] cases and she refuses to learn."; Chief Justice Shepard and Justice Dickson dissenting as to the sanction, believing it to be inadequate). In *Reed*, the respondent alleged only incompetence. In the present case, the respondent alleged deliberately unethical conduct on the part of the Court of Appeals.

The hearing officer recommended that the respondent be suspended from the practice of law for thirty days. Precedent reveals that a suspension for that period is generally sufficient for the types of statements made by the respondent. This Court is quite troubled by the respondent's continued failure to express remorse for his actions and, in particular, the strong indication that he is sorry only for the negative consequences he suffered because of his actions. In light of these considerations, we conclude that a thirty-day suspension should be imposed.

It is, therefore, ordered that the respondent, Michael A. Wilkins, be suspended for a period of thirty (30) days, beginning December 7, 2002, at the conclusion of which he shall be automatically reinstated to the practice of law.

The Clerk of this Court is directed to provide notice of this order in accordance with Admis.Disc.R. 23(3)(d) and to the hearing officer, and to provide the clerk of the United States Court of Appeals for the Seventh Circuit, the clerk of each of the United States District Courts in this state, and the clerks of the United States Bankruptcy Courts in this state with the last known address of respondent as reflected in the records of the Clerk.

Costs of this proceeding are assessed against the respondent.

SHEPARD, C.J., and DICKSON and RUCKER, JJ., concur.

SULLIVAN, J., dissents with separate opinion.

BOEHM, J., dissents with separate opinion.

SULLIVAN, J., dissenting.

I respectfully dissent. When the respondent here said that "one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported that conclusion)," the respondent made a statement of "rhetorical hyperbole," incapable of being proved true or false. The First Amendment provides lawyers who use such hyperbole concerning the qualifications or integrity of the judge protection from sanction.

Appendix A

See Standing Comm. on Discipline of the United States Dist. Court v. Yagman, 55 F.3d 1430, 1438, 1441 (9th Cir.1995). While there is much debate as to how far this protection extends, I agree with Justice Boehm that it extends at least as far as the statement made by respondent here.

BOEHM, J., concurs.

BOEHM, J., dissenting.

I respectfully dissent. I agree with the Court's conclusion that the quoted passage from the text of respondent's brief is not a ground for discipline. Although it is "heavy handed," it nevertheless asserts grounds for transfer provided by this Court's rules.

I disagree that footnote 2, tasteless as it is, is a ground for disciplinary action. The footnote asserts that "one is left to wonder whether the Court of Appeals was determined to find for Appellee . . . and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported that conclusion)." I do not agree with the respondent's contentions in the offending footnote, and I certainly do not condone the respondent's choice of language in expressing them. Moreover, such intemperate language is very poor advocacy, distracting as it does from the points that are sought to be made. I nevertheless do not believe these opinions are sanctionable. Indeed, I would find them within the broad range of protected fair commentary on a matter of public interest.

Although footnote 2 certainly is understood to challenge the intellectual integrity of the opinion, I do not believe it

suggests any motive other than deciding the case in favor of the party the court determined should prevail. It certainly does not suggest criminal motives. In this respect, it seems to me no different from the attacks many lawyers and nonprofessionals have launched on many court decisions, including such notable ones as *Bush v. Gore* and *Brown v. Board of Education*. I cannot see how this footnote differs from the charges occasionally leveled by judges at other judges. For example, Justice Scalia recently contended in *Atkins v. Virginia*, 536 U.S. 304, __, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (Scalia, J., dissenting) that "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." *See also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Scalia, J., concurring) (stating that assertions by Justice O'Connor were "irrational" and "cannot be taken seriously").

Although this Court has previously held that the law of defamation and the law of professional conduct do not overlap, *In re Terry*, 271 Ind. 499, 502, 394 N.E.2d 94, 95-96 (1979), the United States Supreme Court has since made it clear that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). It seems clear to me, then, that Justice Sullivan was correct when he noted in *In re Atanga*, 636 N.E.2d 1253, 1259 n. 1 (1994) (Sullivan J., dissenting), that the "actual malice" test of *N.Y. Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), applies to determinations that an ethics violation has occurred by expressing criticism of a legal opinion. That test is a

subjective one, and for a violation to have occurred the respondent "in fact [had to have] entertained serious doubts as to the truth of [the] publication." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

As the Court points out, the respondent set forth the reasons why he believed his criticism of the Court of Appeals was valid. He contends the court's opinion was "factually and legally inaccurate," misstated the record, misapplied case law and did not discuss other relevant cases. He contends that to this day he "believes in the substance of the language contained in the footnote." Although I do not agree with his conclusions, I can find no basis to find that the respondent entertained serious doubts as to the accuracy of his claims. Therefore, I do not agree the respondent's conduct is punishable under Rule 8.2.

Finally, I think we should be very cautious in imposing discipline for lawyers' acts that question the actions or processes of the courts but do not affect client interests. This Court acts as judge, jury, and appellate reviewer in a disciplinary proceeding. The prosecutor, the Disciplinary Commission, relies on this Court for funding and direction. Where the offense consists of criticism of the judiciary, we become the victim as well. This mixed role is thrust upon us by the State Constitution. I accept it, but believe that it demands the utmost restraint in imposing discipline for expression of criticism of the courts. I would require a finding that a lawyer had at least substantial doubt as to the accuracy of a misstated material fact before sanctioning the lawyer for comments on judicial acts or processes. That standard is not met here.

APPENDIX B — OPINION OF THE SUPREME COURT OF INDIANA DATED JANUARY 3, 2003

Supreme Court of Indiana

No. 49S00-0005-DI-341.

In the Matter of Michael A. **WILKINS**.

Jan. 3, 2003

RUCKER, Justice.

Respondent has moved that I disqualify myself from participation in this case. More precisely, he has filed a petition for rehearing from this Court's 3-2 decision sanctioning him for violating Indiana Professional Conduct Rule 8.2(a). In part, respondent seeks rehearing "in order for Justice Rucker to address whether recusal is appropriate in light of his participation on the Court of Appeals' panel in *Michigan Mutual Insurance Company v. Sports, Inc.*, 698 N.E.2d 834, 845 (Ind.Ct.App.1998)." Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 8.

To place respondent's motion in context, a brief summary of the facts is appropriate. In a lawsuit against Michigan Mutual Insurance Company alleging bad-faith denial of insurance coverage, a jury awarded compensatory and punitive damages to Sports, Inc. The trial court entered judgment on the jury's verdict, and on review the Indiana Court of Appeals affirmed the judgment. I was a member of the Court of Appeals at that time, and along with Judges Darden and Garrard I served on the panel assigned to the case. Judge Darden wrote the opinion and Judge Garrard

concurred. I concurred in the result—neither joining in the reasoning or rationale of the opinion, nor writing a separate opinion of my own.

Michigan Mutual did not seek rehearing of the Court of Appeals' opinion. Rather, represented by the respondent and an attorney from the State of Michigan, Michigan Mutual filed a petition to transfer in this Court. In the petition respondent asserted that the Court of Appeals' opinion materially misstated the record by making affirmative misstatements of fact. In his supporting brief respondent amplified his assertion with the following statement:

> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.

Br. in Supp. of Appellant's Pet. to Trans. at 1.

> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of

> whether the facts or the law supported its decision).

Id. at n. 2. On March 5, 1999, the Indiana Supreme Court denied appellant's petition to transfer. *Mich. Mut. Ins. Co. v. Sports, Inc.*, 706 N.E.2d 555, 556 (Ind.1999). The Court also entered an order striking Michigan Mutual's brief as a "scurrilous and intemperate attack on the integrity of the Court of Appeals." *Id.* at 555. I joined this Court thereafter on November 19, 1999.

On May 30, 2000, the Disciplinary Commission of the Supreme Court of Indiana filed a complaint against respondent Michael A. Wilkins. Based on the above quoted portions of the Michigan Mutual transfer brief, the Commission alleged that respondent violated Rule 8.2(a) of the Rules of Professional Conduct.[1] A hearing officer was appointed and after conducting a hearing determined that respondent violated the Rule as charged. On June 13, 2002, respondent filed a petition with this Court seeking review of the hearing officer's determination. The five-page petition did not cite the Court of Appeals' opinion in *Michigan Mutual.* In addition to the

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1. The Rule provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Ind. Professional Conduct Rule 8.2(a).

petition itself, respondent also filed a twenty-seven page supporting brief. Except for two passing references that were inserted in footnotes, respondent again did not cite the Court of Appeals' opinion in *Michigan Mutual. See* Br. in Supp. of Pet. for Review at 2 n. 3, 17 n. 31. Rather, respondent focused on the commen[illegible] in his 1999 transfer brief to this Court and the substance of the alleged Rule violation.

On October 29, 2002, this Court issued a 3-2 per curiam opinion determining that respondent violated Professional Conduct Rule 8.2(a) and imposing a sanction of a thirty-day suspension from the practice of law. *See In re Wilkins*, 777 N.E.2d 714 (Ind.2002) (Shepard, C.J., and Dickson and Rucker, JJ., concurring; Sullivan and Boehm, JJ., dissenting with separate opinions). Thereafter on November 19, 2002, respondent filed a petition for rehearing. For the first time since these proceedings began, nearly a year and a half ago, respondent moves for my recusal. He does not seek my immediate disqualification. Rather, respondent wants me to remain a part of these proceedings long enough to vote on his petition for rehearing and only then cease further participation in this case.

Citing Canon 3(E) of the Indiana Code of Judicial Conduct respondent contends that my recusal "was and is required." Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 11.[2] The Canon provides in relevant part:

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2. Respondent also cites Canon 2(A) which provides, "[a] Judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Ind. Judicial Conduct Canon 2(A).

(Cont'd)

Appendix B

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
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> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

Jud. Canon 3(E)(1)(a). The underlying thrust of respondent's argument is that because I served on the panel whose opinion respondent criticized, I should have disqualified myself sua sponte from hearing his disciplinary matter.

There is no question that a judge is required to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. The Canon demands it. In addressing those concerns the issue has been cast as "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir.1985). As this court has recently stated, the issue "is not whether the judge personally believes himself

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(Cont'd)

In doing so, respondent provides no independent assessment of its applicability. Rather he references the "impartiality of the judiciary" component of this Canon and then shifts to a discussion of "impartiality" as the term appears in Canon 3(E)(1). *See* Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 14-16.

or herself to be impartial, but whether a reasonable person aware of all the circumstances would question the judge's impartiality." *In re Morton*, 770 N.E.2d 827, 831 (Ind.2002).

The facts and circumstances are these. First, I was completely unaware that I had served on the underlying Court of Appeals panel. Neither before the hearing officer nor in his petition to this court for review of the hearing officer's determination did respondent ever mention that I served on the panel. Rather, at every opportunity respondent focused on the substance of the comments that provided the basis for this disciplinary action. That was my focus as well. Respondent does not reveal why he failed before now to bring this matter to my attention. However, citing to several cases in which I served on the Court of Appeals panel and sua sponte decided not to participate once a party sought transfer to this Court, respondent says that it was "a forgone conclusion that Justice Rucker would recuse." Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 9. However, each case respondent refers to in support of this assertion involved a petition to transfer from a case in which I either wrote a separate dissenting opinion, *see Bagnall v. Town of Beverly Shores*, 705 N.E.2d 213 (Ind.Ct.App.1999); or concurred outright in the majority opinion, *see In re Estate of Troxel*, 720 N.E.2d 731 (Ind.Ct.App.1999); *Dullen v. State*, 718 N.E.2d 1237 (Ind.Ct.App.1999); *Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc.* 714 N.E.2d 1218 (Ind.Ct.App.1999); *United States Gypsum, Inc. v. Ind. Gas Co., Inc.*, 705 N.E.2d 1017 (Ind.Ct.App.1998); *Bosecker v. Westfield Ins. Co.*, 699 N.E.2d 769 (Ind.Ct.App.1998). Unlike a petition to transfer where the Court of Appeals' opinion or decision itself is being challenged, thereby instantly revealing

the composition of the panel deciding the case, the matter before this Court was different. The issue before us was not the Court of Appeals' opinion, but rather what the respondent had to say about the opinion. The composition of the panel deciding the opinion was not at all apparent, nor in my view particularly relevant. The comments themselves were at issue; and regardless of the panel members, either the comments were made "with reckless disregard as to [their] truth or falsity concerning the . . . integrity of a judge" or they were not. *See* Prof. Cond. R. 8.2(a).

In addition, by the time respondent's disciplinary matter reached this Court, I had served on the Court of Appeals for nearly nine years. During that period the Court of Appeals issued over fourteen thousand opinions, some of which, obviously, I authored, others of which I served as a member of the panel. Absent the respondent bringing to my attention that I happened to have served on the underlying Court of Appeals panel in this particular case, I simply would have had no reason to assume my involvement. And this is especially so considering that in his brief before this Court challenging the hearing officer's disciplinary ruling, respondent chose to cite to the Court Appeals opinion only in passing in two of forty-five footnotes. Judges cannot be "call[ed] upon . . . to perform the impossible—to disqualify themselves based on facts they do not know." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Here, the connection between the fact that I served on the *Michigan Mutual* panel and the fact that I participated in respondent's disciplinary action is "so attenuated that no judicial officer could reasonably be expected to identify [this] potential for recusal without the

issue being raised by counsel." *Nat'l City Bank, Ind. v. Shortridge*, 691 N.E.2d 1210, 1211 (Ind.1998).

Second, respondent's failure to raise the issue of my involvement in the underlying Court of Appeals opinion implies one of three possibilities: (1) the respondent was aware that I had served on the Court of Appeals panel but decided not to press the issue because he was satisfied that I would be impartial in deciding this disciplinary matter; (2) the respondent was aware that I had served on the panel but decided to await the outcome of this Court's decision on his disciplinary matter and then seek recusal if the decision were unfavorable; or (3) the respondent himself was unaware that I had served on the panel. This latter possibility is highly unlikely given that within days of this Court's decision both local and national press were reporting it and specifically referencing my involvement in the underlying Court of Appeals opinion. *See, e.g.*, Kevin Corcoran, *Lawyer's Penalty Criticized*, The Indianapolis Star (Nov. 5, 2002) (attributing a statement to source who said "the case shouldn't have gone against Wilkins, because Justice Robert Rucker had served on the Court of Appeals panel Wilkins criticized. That should have kept Rucker from casting a deciding vote. . . ."), *at* http://www.indystar.com; David L. Hudson, Jr., *Footnote In Mouth: Indiana High Court Suspends Lawyer for Comments in Brief*, ABA Journal (Nov. 15, 2002) (noting "[i]n an unusual twist, Justice Robert D. Rucker, who voted with the 3-2 majority, also served on the appellate panel criticized in Wilkins' brief"), *at* http:// www.abanet.org/ journal /ereport/n15suspend.html; Gary Young, *Footnote Gets A Lawyer Suspended*, National Law Journal (Nov. 11, 2002) (commenting "[t]he case has drawn controversy . . .

because one of the judges who voted for Wilkins' suspension, Justice Robert D. Rucker, served on the Court of Appeals until 1999 and had a hand in the decision that Wilkins criticized"), *at* http:// www.nlj.com.[3]

As for possibility number two, respondent's lack of timeliness in seeking recusal is troubling. "Counsel . . . may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits." *Tyson v. State*, 622 N.E.2d 457, 460 (Ind.1993) (quoting *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir.1986)); *see also* Leslie W. Abramson, *Judicial Disqualification under Canon 3 of the Code of Judicial Conduct* 11 (2d ed.1992) (identifying two primary policy reasons for timeliness in the filing of

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3. An observation by the 2nd Circuit Court of Appeals concerning media exposure is instructive:

> [W]ith regard to the appearance of partiality, the appearance must have an objective basis beyond the fact that claims of partiality have been well publicized. . . . That which is seen is sometimes merely a smokescreen. Judicial inquiry may not therefore be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal. The test, as we have stated, is one of reasonableness, and the appearance of partiality portrayed in the media may be, at times, unreasonable.

In re Aguinda, 241 F.3d 194, 201-02 (2d Cir.2001).

recusal motions: (i) a party, although aware of facts that may disqualify a judge, may take a chance on obtaining a favorable trial result and then complain only if the result is unfavorable, and (ii) a motion to recuse is disruptive and delays litigation). That leaves possibility number one: respondent was aware that I had served on the Court of Appeals panel but decided not to press the issue because he was satisfied that I would be impartial in deciding this disciplinary matter. If that is in fact the case, then respondent is correct. Nothing has changed except respondent did not receive the result he anticipated.

Respondent also insists that apart from questions of partiality under Canon 3E(1), my recusal is nonetheless required because I have "personal knowledge of disputed evidentiary facts" under Canon 3(E)(1)(a). Consolidated Pet. for Reh'g and Mot. for Justice Rucker to Recuse at 16. Specifically he claims "[a]s one of the three participants in the *Michigan Mutual* panel's deliberations which must have taken place at least before and/or after the oral argument of July 9, 1998, Justice Rucker unquestionably has personal knowledge of the facts bearing upon Mr. Wilkins' statement." *Id.*

It is not at all clear to me exactly which facts the respondent is referring to. His statement was that the Court of Appeals' opinion "is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)." Br. in Supp. of Appellant's Pet. to Trans. at 1 n. 2. If respondent is implying that I participated in a court conference where a part of the discussion involved ruling against his client

regardless of the law and the facts, then he is mistaken. More to the point, the question is one of respondent's state of mind and of respondent's conduct. *See, e.g., In re Atanga*, 636 N.E.2d 1253, 1257 (Ind.1994). "What did Respondent know at the time he made the statements . . . ? Did he have a basis upon which to make statements concerning the Court? Did the statements he made challenge the qualifications or integrity of the judge? Were the statements reckless in light of his knowledge and experience?" *Id.* (sanctioning an attorney for violating Rule of Professional Conduct 8.2(a) for among other things referring to a trial judge as ignorant, insecure, and a racist). Here, respondent fails to explain how any "facts" that I possess could have any bearing on his state of mind or further what those facts may be.

I am firmly convinced that I have fairly and impartially decided respondent's disciplinary matter. Even had I been conscious of my involvement in the underlying Court of Appeals opinion, I cannot now say that I absolutely would have disqualified myself from deciding the instant case. After all, as reflected by my "concur in result" vote, although I agreed with the majority's conclusion that the trial court's judgment affirming the jury verdict was correct, I did not agree with the majority's reasoning and rationale in reaching that conclusion. Consequently, I would not have been especially concerned about the respondent's criticism of the opinion.

Nonetheless, I acknowledge that the question is not whether I personally believe I have been impartial. Rather, it is whether a "reasonable person aware of all the circumstances" would question my impartiality. *Morton*, 770 N.E.2d

at 831. And in this context a "reasonable person" has been described as "the proverbial average person on the street with knowledge of all the facts and circumstances alleged in the motion to recuse. . . ." *In re Martin-Trigona*, 573 F.Supp. 1237, 1243 (D.Conn.1983). Echoing this sentiment one court has observed "disqualification of a judge is mandated whenever a significant minority of the lay community could reasonably question the court's impartiality." *Pennsylvania v. Druce*, 796 A.2d 321, 327 (Pa.Super.Ct.2002), *appeal granted in part*, 809 A.2d 243 (Pa.2002). In this case there is a possibility, particularly outside of the legal community, that my impartiality could be questioned. *See, e.g., United States v. Jordan*, 49 F.3d 152, 157 (5th Cir.1995) (noting that the average person on the street as "an observer of our judicial system is less likely to credit judges' impartiality than the judiciary"); *In re Mason*, 916 F.2d 384, 386 (7th Cir.1990) (observing that a lay observer would be less inclined to credit a judge's impartiality than other members of the judiciary). Because a judge has a duty to promote public confidence in the impartiality of the judiciary, *Tyson*, 622 N.E.2d at 459, and because "[c]oncerns about public confidence in the judicial system" underlie Canon 3, *id.*, out of an abundance of caution I therefore recuse myself from further involvement in this case. And I do so effective immediately declining respondent's request to consider first his petition for rehearing now pending before this Court.

APPENDIX C — OPINION OF THE SUPREME COURT OF INDIANA DATED FEBRUARY 4, 2003

Supreme Court of Indiana

No. 49S00-0005-DI-341.

In the Matter of Michael A. **WILKINS,**

Respondent.

Feb. 4, 2003

DISCIPLINARY ACTION

ON PETITION FOR REHEARING

DICKSON, Justice.

The respondent in this attorney discipline matter seeks rehearing following our *per curiam* opinion, *Matter of Wilkins*, 777 N.E.2d 714 (Ind.2002), which held that certain remarks in the respondent's brief supporting his petition for transfer in a prior case violated Indiana Professional Conduct Rule 8.2(a) and warranted his suspension from the practice of law for thirty days. His petition requests reconsideration of (1) the application of the First Amendment protection to the offending remarks, and (2) the appropriate sanction to be imposed.

We dispose of these requests largely on the difference between sound advocacy and defamation. Lawyers are completely free to criticize the decisions of judges. As licensed professionals, they are not free to make recklessly false claims about a judge's integrity.

Appendix C

I.

We decline to grant rehearing as to the First Amendment issue. Aside from First Amendment considerations, however, we acknowledge that important interests of judicial administration require considerable latitude regarding the content of assertions in judicial pleadings, motions, and briefs. Just as we must seek to preserve the public respect and confidence in the judiciary, in prescribing practice and procedures for the proper administration of justice we must also preserve the right of a party to access and use the judicial system to present a "good faith argument for an extension, modification, or reversal of existing law." Ind. Professional Conduct Rule 3.1. The Comment to Rule 3.1 observes: "[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change."

In *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151 (Ind.1987), this Court emphasized the need for an appellate tribunal to use extreme restraint in stifling appellate advocacy: "[W]e cannot fail to recognize that the imposition of punitive sanctions does have significant negative consequences. . . . It will have a chilling effect upon the exercise of the right to appeal. It will discourage innovation and inhibit the opportunity for periodic reevaluation of controlling precedent." *Id.* at 152. Concluding that "we must invite, not inhibit, the presentation of new and creative argument[,]" we held in *Orr* that "punitive sanctions may not be imposed to punish lack of merit unless an appellant's contentions and argument are utterly devoid of all plausibility." *Id.* at 153.

These considerations are limited, however, by Indiana Professional Conduct Rule 8.2(a), which provides in relevant part: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge. . . ." Our *per curiam* opinion noted that the respondent's brief suggested that the decision of the judges on the Court of Appeals resulted from unethical motivations. The offending language consisted of footnote 2 to his brief, stating:

> Indeed, the [Court of Appeals] Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

Wilkins, 777 N.E.2d at 716.

The language of footnote 2 does not merely argue that the Court of Appeals decision is factually or legally inaccurate. Such would be permissible advocacy. The footnote goes further and ascribes bias and favoritism to the judges authoring and concurring in the majority opinion of the Court of Appeals, and it implies that these judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome. These aspersions transgress the wide latitude given appellate argument, and they clearly impugn the integrity of a judge in violation of Professional Conduct Rule 8.2(a). We decline to revise our determination that the respondent violated Rule 8.2(a).

Appendix C

II.

We grant rehearing in part, however, as to the particular issue of the appropriate sanction to be imposed for this violation. Upon further reconsideration we are persuaded to revise the nature of the discipline.

As noted in our *per curiam* opinion, the respondent timely contacted the offices of both the Chief Judge of the Indiana Court of Appeals and the Chief Justice of Indiana, and thereafter wrote to both the Chief Judge and the Chief Justice "offering to apologize in person and to acknowledge that the footnote was 'overly-aggressive and inappropriate and should never have made its way into our Brief.' " *Wilkins*, 777 N.E.2d at 716.

We also give renewed consideration to the Hearing Officer's findings that the respondent has maintained an outstanding and exemplary record for honesty, integrity, and truthfulness among his peers in the Bar, and among members of the judiciary. This warrants substantial weight. Furthermore, although the respondent's role in signing and filing the brief constitutes joint responsibility pursuant to Indiana Admission and Discipline Rule 3(2)(d), we note that the language of the footnote was not authored by the respondent but by an out-of-state co-counsel.

We find unpersuasive, however, assertions that some other prominent American lawyers or judges may have engaged in similar techniques of argument. Such unfortunate occasional resorts to uncivil dialogue should not be our standard for acceptable Indiana pleading and practice.

Appendix C

Upon rehearing as to the sanction, we conclude that the respondent's penalty in this disciplinary proceeding should not consist of a period of suspension but rather only the public reprimand already effected by the content of our initial *per curiam* opinion.

Rehearing is granted in part and denied in part, and the respondent's sanction is revised from a thirty-day suspension from the practice of law to a public reprimand. Because we are only granting rehearing on a particular point, rather than a general rehearing, our *per curiam* opinion remains in effect except as modified herein. *See Griffin v. State*, 763 N.E.2d 450, 451 (Ind.2002).

SHEPARD, C.J., concurs; BOEHM, J., concurs in result with separate opinion; RUCKER, J., not participating; SULLIVAN, J., dissents, believing respondent's conduct was speech protected by the First Amendment and so no sanction is permissible. *See In re Wilkins*, 777 N.E.2d 714 (Ind.2002) (Sullivan, J., dissenting).

BOEHM, Justice, concurring in result.

I continue to adhere to the view that the respondent did nothing that this Court should find sanctionable. Specifically, I believe the statements attributed to the respondent are protected by both the First Amendment to the Constitution of the United States and by Article I, Section 9 of the Indiana Constitution. Even if these statements were not constitutionally protected, for the reasons given in my original dissent, I would not find them to violate the Rules of Professional Responsibility. Therefore, I would grant rehearing on all

aspects of the Court's initial opinion. However, there is no majority to grant rehearing on the sanction unless a public reprimand remains in place. For that reason, I concur in the result to impose a public reprimand rather than leave in place the thirty-day suspension already imposed.

The respondent's petition to rehear this matter arrives in an extremely unusual procedural posture. Although the full court addressed the case initially, only four Justices remain to consider the petition to reconsider. If a majority votes to grant rehearing, the effect is to recall the former opinion, and Wilkins' case would be before us "as if it had never been decided." 2 Arch N. Bobbitt, *Indiana Appellate Practice and Procedure*, § 62:11, at 625 (1972); *see also Bally v. Guilford Township Sch. Corp.*, 234 Ind. 273, 275, 126 N.E.2d 13, 15 (1955); *Booher v. Goldsborough*, 44 Ind. 490, 496 (1873); Terrance L. Smith and Anthony DeBonis Jr., *Appellate Handbook for Indiana Lawyers*, § 19:8, at 302 (1987). If rehearing is granted on a single issue—in this case the proper sanction—the original opinion stands as to all other issues, and only the sanction is vacated. *Griffin v. State*, 763 N.E.2d 450 (Ind.2002).

The votes of the Chief Justice and Justice Dickson are to grant rehearing as to the sanction only, and to impose a public reprimand. Justice Sullivan and I would vote for no sanction at all. But if neither of us joins in the result reached by Justice Dickson and the Chief Justice, we have no majority to grant rehearing as to any aspect of the original opinion and Wilkins' thirty-day suspension stands. Lewis Carroll would love that result: half the Court believes no sanction is appropriate, and half would impose a small sanction, so the

result is a major penalty. Only those who love the law could explain that to their children. To free parents everywhere from that burden, I concur in the result of granting rehearing as to the sanction and reducing it to a public reprimand.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION DATED APRIL 3, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NO. MISC 02-106-IP

IN THE MATTER OF:

MICHAEL A. WILKINS

ORDER

The Chief Judge having considered the respondent's Return to Order to Show Cause now finds that the Respondent has shown cause why this Court should not impose discipline identical to that imposed by the Indiana Supreme Court.

Respondent's Request for Review and Determination En Banc and Request for Oral Argument are hereby DENIED.

The Chief Judge finds that discipline from this Court, in addition to the discipline assessed by the Indiana Supreme Court, is not necessary under the facts and circumstances of this case.

IT IS SO ORDERED this 3rd day of April, 2003.

s/ Larry J. McKinney
LARRY J. MCKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana